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Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1985

HOLYOKE WATER POWER COMPANY,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CORNELIUS J. MOYNIHAN, JR., P.C.
STEWART A. BRODER*
PEABODY & BROWN
One Boston Place
Boston, MA 02108
(617) 723-8700
Counsel for Petitioner
Holyoke Water Power Company

Of Counsel:
JASON BERGER, P.C.
ROSEMARY W. SPAETH

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* ATTORNEY OF RECORD

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below erred in failing to adopt the National Labor Relations Board's use of the *Babcock & Wilcox* balancing test to resolve the conflict between an incumbent union's request for access to an employer's premises to obtain health and safety information, and an employer's private property rights.

2. Whether the National Labor Relations Board erred in its application of the *Babcock & Wilcox* test, by failing to allocate to the union the burden of proving that it has exhausted reasonable alternatives to interference with the employer's private property rights.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

1. Holyoke Water Power Company;
2. National Labor Relations Board;
3. Local 455, International Brotherhood of Electrical Workers, AFL-CIO (Intervenor).

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of the Supreme Court Rules, the following is a list of all parent companies, subsidiaries and affiliates of Holyoke Water Power Company.

Petitioner has one wholly owned subsidiary, Holyoke Water Power and Electric Company. Petitioner is the wholly owned subsidiary of Northeast Utilities.

Northeast Utilities has the following wholly owned subsidiaries in addition to the Petitioner:

1. The Connecticut Light and Power Company;
2. Western Massachusetts Electric Company;
3. The Quinnehtuk Company;
4. The Rocky River Realty Company;
5. Northeast Nuclear Energy Company; and
6. Northeast Utilities Service Company.

The Connecticut Light and Power Company has the following wholly owned subsidiaries:

1. The Shelton Canal Company;
2. Research Park, Inc.;
3. The City and Suburban Electric and Gas Company (Inactive);
4. Electric Power Incorporated (Inactive);
5. The Connecticut Transmission Corporation (Inactive);
6. The Nutmeg Power Company (Inactive);
7. The Mohawk Gas Company (Inactive); and
8. The Connecticut Steam Company (Inactive).

The Connecticut Light and Power Company and Western Massachusetts Electric Company, respectfully, have minority ownership interests in the following companies:

1. Connecticut Yankee Atomic Power Company;
2. Yankee Atomic Electric Company;
3. Maine Yankee Atomic Power Company; and
4. Vermont Yankee Nuclear Power Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Holyoke Water Power Company, respectfully prays that a writ for certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in this case on November 27, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 778 F.2d 49 (1st Cir. 1985) and is reproduced in Appendix A of this petition. The court issued its mandate on December 19, 1985, which is reproduced in Appendix B of this petition. The Decision and Order of the National Labor Relations Board, issued on January 11, 1985, and reported at 273 N.L.R.B. No. 168 (1985), is reproduced in Appendix C of this petition. The opinion of the Administrative Law Judge, Martin Linsky, issued on August 31, 1983, is reproduced in Appendix D of this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on November 27, 1985. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (hereinafter "the Act"). Section 7 of the Act, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . .

Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5), state in pertinent part:

> 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 10(c) of the Act, 29 U.S.C. § 160(c), provides in pertinent part:

> 10(c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state

> its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .

STATEMENT OF THE CASE

Holyoke Water Power Company (hereinafter referred to as "the Company" or "the Employer"), a subsidiary of Northeast Utilities, operates the Mt. Tom power plant in Holyoke, Massachusetts. The employees at the Mt. Tom facility have been represented by the International Brotherhood of Electrical Workers (hereinafter referred to as the "I.B.E.W.") since 1938, and by Local 455 of the I.B.E.W. (hereinafter referred to as "the Union") since 1971.

In late fall of 1981, Mt. Tom converted its power generating source from oil to coal. Under the terms of the 1980-1982 Collective Bargaining Agreement between the Company and the Union, this conversion was subject to a reopener of contract negotiations. The contract language limited the scope of the reopened negotiations to the effects of the coal conversion.

During the reopener negotiations in November 1981, the Union brought to the bargaining table a number of safety concerns which had arisen from the conversion to coal. Although an area known as the Forced Draft Fan Room had not been affected by the conversion to coal and, in fact, had remained unchanged since its construction in 1960, the Union briefly adverted to the noise level of this room as a safety concern. The Union did not pursue the issue of the Forced Draft Fan Room when management negotiators indicated that this room had not been affected by the conversion to coal and, thus, was not within the purview of the reopener.

During the reopener negotiations, the Union sought access to the Mt. Tom plant for a hygienist of its choosing. The Union's reason for seeking such access was the inspection of the new coal handling areas of the plant for possible health hazards.

The Company initially denied any access to the Union's hygienist, offering instead both the reports of its own hygienist regarding the coal handling areas, and access to such areas to the Union itself. The Union, dissatisfied with the Company's offer, filed an unfair labor practice charge with the National Labor Relations Board (hereinafter referred to as "the Board"), which was settled in September, 1982. Under the terms of this Settlement Agreement, a copy of which is reproduced in Appendix E of this petition, the Employer allowed a qualified industrial hygienist, chosen by the Union, access to the Mt. Tom facility to perform noise and dust testing in coal handling areas of the plant, and testing of sulphur dioxide flu gas conditioning equipment. The Fan Room is not mentioned in this Settlement Agreement. Neither the Union nor the Board has contended that the Employer's action in the instant case in any way violated this Settlement Agreement, nor asked that the Agreement be set aside.

In accordance with the terms of this Settlement Agreement, the Union's hygienist, Mr. Youngstrom, and its business agent, Mr. Collins, arrived at the Mt. Tom plant on January 11, 1983, to conduct the agreed upon tests. When Mr. Collins and Mr. Youngstrom arrived on the Employer's premises, their right of access for inspection and testing extended only to those areas specified in the Settlement Agreement. However, in a meeting that morning with Mr. Robert E. Dwyer, Station Superintendent of the Mt. Tom facility, Mr. Collins stated that the Union wanted access to the Forced Draft Fan Room to take readings in that area, as well as in the areas that had been agreed upon. The only reason given by the Union for its request was that the Fan Room was covered by the Settlement Agreement.

Before responding to the Union's request for access to the Fan Room, Mr. Dwyer called Donald Riga, Regional Personnel Manager, who in turn consulted legal counsel as to the extent of the premises covered by the Settlement Agreement. On the advice of counsel, the Employer determined that the Fan Room was not covered by the Settlement Agreement. Mr. Dwyer then informed Mr. Collins that the Union's request for access to the Fan Room had been denied. Mr. Collins asked to speak with Mr. Riga using the office telephone, and was allowed to do so. Mr. Riga explained to Mr. Collins that the Fan Room was not covered by the Settlement Agreement, and it was the decision of Northeast Utilities Production Department management that the Union not be allowed access to the room. Mr. Collins again requested access to the Fan Room, this time without giving any reason for such request other than that he would eventually gain such access through the National Labor Relations Board.

On the day after the inspection, January 12, 1983, the Union sent a letter to Mr. Riga again requesting access to the Fan Room. Although the Employer continued to refuse the Union's request for access to the room, it did supply the Union with personal noise dosimeter readings of employees taken in connection with the Employer's Hearing Conservation Study. This study consisted of a a random sampling of employees including several who worked in the Fan Room. The results of the dosimeter testing were provided to the Union in January 1983. In addition, the Employer had one of its Test Department technicians, who was specially trained in sound-level phenomena, perform noise-level testing in the Fan Room. The results of these tests were provided to the Union on March 18, 1983.

Despite the existence of both an in-plant and a company-wide safety committee designed to address employees' safety concerns, employees have never raised the safety of the Fan Room as an issue in these safety meetings. Similarly, there has

never been a single employee grievance filed about the Fan Room. There has been no significant change in the construction or operation of the Fan Room since it was built in 1960, and it was essentially unaffected by the conversion from oil to coal.[1] Further, the Employer has demonstrated its awareness of the noise level in the Fan Room. The entrances to the Fan Room are posted with warning signs alerting employees to the noise level and requiring ear protection to be worn at all times. Ear muffs and/or ear plugs are provided to employees for this purpose.

The Board, in its Decision and Order, reviewed the decision of Administrative Law Judge Martin J. Linsky, which was issued on August 31, 1983. Judge Linsky, in his decision, citing *Winona Industries, Inc.*, 257 N.L.R.B. 695 (1981), held that a union request for access to study a potential health hazard was, in essence, an information request. Under the Act, information must be provided by an employer to a union if the information sought is relevant and necessary to the union's performance of its representational duties. On the basis of this holding, the Administrative Law Judge ordered that an industrial hygienist of the Union's choosing be granted access to the Employer's facility to study potential noise hazards in the Fan Room.

The Board, in its January 11, 1985 decision, disagreed with the Administrative Law Judge's finding that an access request was tantamount to an information request. The Board, citing *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), viewed

[1] The First Circuit has noted in its opinion that prior to the conversion to coal, the fans in the Fan Room operated sixty (60%) percent of the time, and that after the conversion the fans operated ninety-five (95%) percent of the time. *National Labor Relations Board* v. *Holyoke Water Power Company*, 778 F.2d 49, 52 (1st Cir. 1985). Although the fans did operate for a longer period of time, they continued to operate at the same volume and intensity as they had prior to the conversion. Since employees were inside the Fan Room on an average of the same length of time per day before and after the conversion, the slightly extended operation of the fans, without increase in volume, did not create a greater noise hazard than had existed prior to the conversion.

the problem as a conflict between the union's right of access to the employer's premises and the employer's private property rights, and held that a balancing test between these two conflicting interests should govern the case. According to the Board, if a union can effectively represent employees with regard to the safety concern through some alternate means, that is, other than by entering the employer's premises, the employer's private property rights will predominate and the union may be properly denied access. The Board further held that to the extent that the use of this balancing test was inconsistent with earlier Board cases adjudicating access requests by union representatives in safety or health matters, the instant case overruled those prior Board cases, including *Winona Industries, Inc.*, 257 N.L.R.B. 695 (1981).

After fashioning this new balancing test for utilization in cases in which a union seeks access to investigate safety or health issues, the Board applied its test to the facts of the instant matter and held that the Employer must permit a Union hygienist to enter its Fan Room to test for noise hazards.

On March 18, 1985, the National Labor Relations Board filed in the Court of Appeals for the First Circuit an Application for Enforcement of its Order against Holyoke Water Power Company. In its November 27, 1985 decision, the Court of Appeals affirmed the finding of the Board that the Union's industrial hygienist is entitled to access to the Employer's Forced Draft Fan Room to test for noise hazards. In its analysis of the case, the court favored the application of the *Winona* test utilized by the Administrative Law Judge, even though this test had been overruled by the Board. The court declined to decide whether the general balancing formula of *Babcock & Wilcox* applies to requests for access by unions that already represent employees. The court below justified its failure to adopt a standard on the ground that in this case, the same result would be achieved under either test.

Holyoke Water Power Company does not challenge the Board's designation of the *Babcock & Wilcox* balancing test as the appropriate analysis to be used in health and safety cases. The Company does question whether the accommodation of the union's and employer's interests reached by the Board, and inadequately addressed in *dictum* by the reviewing court, reflects an accurate application of the *Babcock & Wilcox* standard. Further, the Company questions whether the Board correctly assigned the burden of proof in its application of the balancing test. Finally, the Company challenges the reviewing court's refusal to adopt any standard to be used in evaluating access requests for health and safety information, thereby leaving employers and unions without direction in resolving future access requests.

REASONS FOR GRANTING THE WRIT

A union's right of access to an employer's property has been frequently litigated before both the Board and the courts. The number of access cases which have reached this Court testifies to the importance of this issue and to the continuing tension between a union's need for access to an employer's premises and an employer's private property rights.

The inherent conflict between these competing interests has frequently required this Court to adapt established principles to new and varied fact patterns. The case at bar, involving a union request for access to the employer's property to investigate a health and safety issue, again requires this Court to resolve these conflicting interests in a novel setting.[2] The decisions below, rather than clarifying the test to be used in adjudicating the conflict between an employer's private property rights and a union's right to health and safety information, have plunged this area of federal labor law into even greater confusion.

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[2] The public importance and interest in the access issue raised in this case is evidenced by the fact that the AFL-CIO and United States Chamber of Commerce filed briefs as *amici curiae* below.

The Court of Appeals, in favoring the information test applied by the Administrative Law Judge, and in finding that the Union hygienist should have been admitted to the Fan Room under *Winona*, implicitly rejected the Board's decision to frame this case as one involving access to private property. Thus, the Board and the court below differ not only on the standard to be applied, but also as to what constitutes the central issue in this case. The court has dismissed this difference in analysis as inconsequential on the basis that, under either test, an identical outcome would result in this case. Petitioner contends that in reasoning backwards from its result, the court has failed to perform its judicial function of determining whether the Board has acted pursuant to an erroneous view of the law. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In revitalizing *Winona* without overruling the Board's test, the court has authorized the application of dual, but conflicting, standards in situations involving access requests for health and safety information. By reasoning from, rather than to, its result, the court has abdicated its responsibility of providing future direction in an important area of federal labor law.

In contrast to the court below, Petitioner contends that the difference between regarding the instant request as one for access and as one for information is a critical one. To consider such requests as information requests, merely because they have information as their ultimate object, ignores the fact that such requests inevitably involve access to an employer's premises by non-employees, and thereby implicate an employer's private property rights. The Board correctly recognized this fact, and adopted a test designed to acknowledge the implication of the Employer's interests. By placing its imprimatur on the inadequate *Winona* standard, the reviewing court has

declined to give appropriate consideration to the rights of employers, and thus frustrated, rather than furthered, the purposes of the Act.[3]

The critical importance of the exchange of health and safety information between employers and employees cannot be denied. However, the property and managerial interests of employers cannot be justly ignored. A decision by this Court is necessary to resolve the conflict between the Board and the reviewing court in order that a uniform federal law be established which will adequately address all the issues raised by a union's need for health and safety information, including the impact of such a request on an employer's private property rights.

I. The Court of Appeals Failed To Defer to the Board's Special Expertise.

It is a well-established principle that when, in the context of a question of labor policy, "the ultimate problem is the balancing of the conflicting legitimate interests," it must be

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[3] In *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, *reh. den.*, *NLRB* v. *LeTourneau Co.*, 325 U.S. 894 (1945), this Court articulated the broad legal principle which must govern the balancing of the rights of employers and employees in the development of national labor policy.

> [The Board must adjust] the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without any regard to any duty which the existence of rights in others may place upon employer or employee.

Id., at 797-798.

This principle was further developed in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956):

> Accommodation between [employee organization rights and employer property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other.

Id. at 112.

remembered that "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union*, 353 U.S. 87, 96 (1957). In this case, the Board has exercised its special expertise at balancing the conflicting interests of the Employer and the Union by acknowledging that the Employer's property rights are implicated by the instant access request, and by structuring its analysis to address this factor. In suggesting that the Union's request should have been construed as an information request, and granted under *Winona*, the Court of Appeals has undermined the Board in its principal function—"applying the general provisions of the Act to the complexities of industrial life." *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

It is well settled that so long as the Board has reached a fair and reasonable balance upon a question within its special competence, its interpretation of the Act is entitled to deference from the courts. *Id.* at 266. The Board's broad authority to construe the National Labor Relations Act in light of its expertise may extend in appropriate circumstances to electing to abandon or modify established precedent. *Prill* v. *NLRB*, 755 F.2d 941 (D.C. Cir.), *cert. denied*, *Meyers Industries, Inc.* v. *Prill*, 54 USLW 3309 (1985). The Board's rulings, when supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusion rests on erroneous legal foundations. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). In this case, the court below not only failed to defer to the Board's rule, but also failed to overturn the Board's standard as resting on an erroneous legal foundation.

In failing to overrule or to defer to the Board, and in resurrecting *Winona*, the Court of Appeals has misconstrued the purpose of its review under the Act. If the court believed that,

in adopting a *Babcock & Wilcox* standard and overruling established precedent, the Board acted pursuant to an erroneous view of the law, it was the duty of the court to reverse the Board and remand the case for reconsideration according to the correct standard. Otherwise, it was the duty of the court to defer to the Board's expertise, and adopt the *Babcock & Wilcox* standard in cases of access requests for health and safety information. Instead, the court returned to the *Winona* standard, which was specifically rejected by the Board. By authorizing the application of inconsistent standards, the court has deprived employers and unions of much needed direction in handling future access requests.

In the absence of any showing that the Board's holding was based on an erroneous legal foundation, the Board's decision to adopt *Babcock & Wilcox* as the correct standard to be applied in resolving union requests for access to health and safety information was entitled to judicial deference. The chief objection of the Union to the application of the *Babcock & Wilcox* standard, apparently shared by the appellate court, is that this standard has been primarily applied in organizational cases, rather than to unions which already represent employees. The fact that the Union in the instant case is the incumbent bargaining representative of the Company apparently has misled the appellate court, as the Administrative Law Judge was misled, toward applying an information analysis, despite the fact that *access* rather than information is the central issue in this case.

Petitioner contends that the Board correctly concluded that the instant case includes a dimension which removes it from the realm of information cases. From the beginning, the Union has framed its need for information about the Fan Room as an *access* request, rather than an *information* request. When the Union initially expressed concern about the Fan Room, on January 11, 1983, the Union conveyed this concern by requesting that industrial hygienist Youngstrom gain physical access to the interior of the Fan Room to conduct noise testing.

This January 11, 1983, request for access was neither preceded by, nor followed by, any request for information about the Fan Room, but was supplemented by a written request for access, *not information*, on January 12, 1983. This insistence by the Union that nothing short of physical access to the Fan Room would satisfy its purpose, prompted the Board to decide that the Union's demand must appropriately be weighed against the Employer's private property rights, which would not ordinarily be considered in the context of an information request.

In light of the fact that this case presents an access rather than an information request, the decision of the Board to apply the *Babcock & Wilcox* standard was ineluctable. As in the organizational cases, which have traditionally applied the *Babcock & Wilcox* standard, the instant case involves an attempt by a non-employee to secure access to the Employer's property. The decisions of the Board applying the *Babcock* standard in organizational cases demonstrate that historically, the Board has limited the right of non-employees to enter an employer's property.[4] Even in the organizational setting, when employees' Section 7 rights are at stake, the Board and the Court have held that the Union bears a heavy burden to establish the need to overcome an employer's property rights. In *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Supreme Court stated that while an employer "...may not always bar non-employee union organizers from his property, his right to do

[4] Access has been typically permitted only in cases where the union has established the inaccessibility of employees in non-working locations during non-working hours. *See e.g., Sioux City & New Orleans Barge Lines, Inc.*, 193 N.L.R.B. 382 (1971), *enforcement denied, NLRB* v. *Sioux City & New Orleans Barge Lines, Inc.*, 472 F.2d 753 (8th Cir. 1973); *Ingram Barge Co.*, 204 N.L.R.B. 63 (1973) (wide dispersion of employees over several states). Access has also been permitted where employees have lived at remote work sites and rarely left the work site. *NLRB* v. *Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948) (isolated lumber camp); *Husky Oil*, 245 N.L.R.B. 353, *enforced sub nom., Husky Oil, N.P.R. Operations, Inc.* v. *NLRB*, 669 F.2d 643 (10th Cir. 1982).

so remains the general rule." *Id.* at 205. The extension of the *Babcock & Wilcox* standard by the Board to the instant case indicates that even an incumbent union must overcome a substantial burden in order to supersede an employer's private property rights.

The Board and the courts have traditionally applied a balancing test in adjudicating access requests in situations other than union organizational efforts. The Board has applied a balancing test when a certified bargaining representative has sought access to obtain information "relevant and necessary" to negotiating or policing a collective bargaining agreement. *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956). For the most part, these cases have involved requests for observation of the performance of certain jobs which were paid on an incentive or piece rate basis, in order for the union to negotiate a contract in an informed manner. *See, e.g., Hamburg Shirt Corp.* v. *NLRB*, 419 F.2d 1275 (8th Cir. 1969); *McGraw Edison Co.* v. *NLRB*, 419 F.2d 67 (8th Cir. 1969); *Waycross Sportswear, Inc.* v. *NLRB*, 403 F.2d 832 (5th Cir. 1968); *Triangle Plastics, Inc.*, 191 N.L.R.B. 347 (1971). Similarly, requests for access have been granted to evaluate whether a grievance is meritorious and should be processed. *See, NLRB* v. *Kendall Co.*, 83 L.R.R.M. 3068 (4th Cir. 1973); *Texaco, Inc.* v. *NLRB*, 407 F.2d 754 (7th Cir. 1969); *General Electric Co.*, 173 N.L.R.B. 164 (1968), *enforced sub nom., General Electric Co.* v. *NLRB*, 414 F.2d 918 (4th Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970); and *Wilson Athletic Goods Mfg. Co., Inc.*,169 N.L.R.B. 621 (1968). In these situations, when confronted with an access request by a certified bargaining representative, the Board has carefully scrutinized the assertion that a non-employee union representative needed to make a personal observation of the job or jobs in issue.[5]

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[5] The Court of Appeals for the Second Circuit elaborated on the standard which an incumbent collective bargaining representative must meet to obtain access for time studies in *Fafnir Bearing Co.* v. *NLRB*, 362 F.2d 716

(footnote continues)

In sum, the relevant case law establishes that there is considerable precedent in support of the application of a balancing test in weighing interests of an employer against those of an incumbent bargaining representative. Since the case at bar implicates the Employer's property rights in a unique way, it is not only logical, but consistent with a long line of Board precedent, that the Board chose to apply the balancing test traditionally used in resolving conflicts between an employer's property rights and the access needs of non-employee union representatives. The fact that the Board chose to depart from a traditional information analysis in no way attenuates the validity of the Board's new test. According to the Supreme Court in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975):

> The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the routine of administrative decision making. 'Cumulative experience begets understanding and insight by which judgments are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation, differentiates more than anything else the administrative from the judicial process.' [quoting] *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953).

The court below suggests that the application of the *Babcock & Wilcox* standard to protect an employer's property rights may be inappropriate when an employer is already sub-

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[5] (cont.) (2nd Cir. 1966), "... independent time studies should be authorized only when essential for the union to function intelligently in behalf of employees and only when such studies will not unduly disrupt the productive operations of the company." *Id.* at 722.

ject to a duty to bargain. *NLRB* v. *Holyoke Water Power Company*, 778 F.2d 49, 52 (1st Cir. 1985). The Petitioner contends that it is the Union's status as an incumbent bargaining agent which makes the Employer especially vulnerable to the Union's interference with its property rights, unless the Union is obligated to meet some burden in demonstrating a need for access to the Employer's premises. In this case, the Union could easily have negotiated for access to the Fan Room as part of the Settlement Agreement which resolved the unfair labor practice charge filed during the coal reopener negotiations. It failed to do so, and instead made its first demand for access to the Fan Room after the negotiations concluded and after the Settlement Agreement had been executed. Thus, the Union is now attempting to secure through the courts what it had neglected to request or secure through negotiation. The Board and the Court of Appeals have rewarded the Union for its delinquency in failing to negotiate for access to the Fan Room by permitting it to usurp the Employer's property rights. In sum, the Union's status as an incumbent representative, and the potential for abuse which that status creates, argues for, rather than against the adoption of the *Babcock* test.

The need for the application of a balancing test to address the employer's private property rights is more compelling since the instant access request did not arise out of employee concern, or result from any new development about the Fan Room.[6] This request evolved exclusively from the Union's self-

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[6] In this regard, the return to the *Winona* standard augured by the reviewing court's decision is particularly inapposite. In *Winona*, the employer instigated employee concern about safety conditions by posting notice to all employees to the effect that the wearing of tank top shirts was contrary to OSHA requirements. When employees learned that OSHA had no such requirement, a grievance was filed and at least four meetings were held between the union and management with regard to this matter. Thus, the presence of employee concern about safety conditions in *Winona* was far greater than the practically non-existent concern in the instant case.

ordained mission to secure unfettered access to the Employer's premises for Union-sponsored personnel. Thus, the Union has attempted to circumvent the collective bargaining process by making unilateral decisions about representational needs. Unless an employer's property rights are assured of some recognition, particularly with reference to the demands of an incumbent union, the joint administration of labor relations by employers and unions envisioned by the Act will be illusory. As this Court recognized in quoting the first annual report of the Board in *NLRB* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960), "[c]ollective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground. . . ." *Id.* at 485.

The Petitioner urges that unless the *Babcock & Wilcox* standard is firmly established by this Court as the appropriate analysis to be used in a case such as this one, union requests for information, which are, in reality, requests for access, will have grave potential for abuse.

II. The Board Erred in Its Application of the *Babcock & Wilcox* Test

In recognizing the *Babcock & Wilcox* standard as the controlling rule to be applied in health and safety cases, the Board adopted this standard in its entirety. *Babcock & Wilcox* requires that a union bear the burden of pursuing reasonable alternatives to access, before access should properly be granted. As the Board stated in this case: "[w]here it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access." *Holyoke Water Power Co. & Local 45, I.B.E.W.*, 273 N.L.R.B. No. 168 (1985).

The *Babcock* standard has been the subject of extensive litigation at both the administrative and judicial level. As a result, well-established and restrictive rules governing union access rights to company property have been developed by the courts. While these rules have not yet been applied to a safety access request, they are now applicable given the Board's adoption of *Babcock & Wilcox* as the standard to be applied in resolving safety access questions.

A principal case interpreting the *Babcock & Wilcox* standard is *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). In *Sears*, which involves an organizational situation, the Supreme Court stated that,

> [t]o gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employer's employees exists. . . . That the burden imposed on the Union is a heavy one is evidenced by the fact that the balance struck by the Board and the Courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity.

Id. at 205.

While *Sears* addresses a union request for access for a different purpose than in the instant case, the Supreme Court's language remains instructive. The courts have allocated the burden of establishing that access is necessary entirely to the union. Under this burden, which according to this Court is very difficult to meet, the union must establish that no other means of gaining the information sought is reasonable. *Belcher Towing Co.* v. *NLRB*, 614 F.2d 88, 91 (5th Cir. 1980); *Hutzler Brothers Co.* v. *NLRB*, 630 F.2d 1012 (4th Cir. 1980); *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794 (3rd Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972).

The Court of Appeals for the Second Circuit has held that in order to sustain its burden of proving lack of alternative means, a union must demonstrate that it unsuccessfully attempted to utilize other means. A mere lackadaisical effort to utilize alternatives will not be sufficient to meet such requirement. *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794, 797-798 (3rd Cir. 1971), *cert. denied*, 409 U.S. 1012 (1972). In this case, the Union was not merely lackadaisical. It made no effort to utilize or even explore other means.

The Board, after properly adopting the *Babcock & Wilcox* test as the standard for resolving access requests for health and safety information, proceeded to ignore the test. After establishing that the burden rested with the Union to consider reasonable alternatives to access, the Board never addresses whether or not the Union discharged its burden. To the contrary, the Board's opinion seems to shift this burden to the Employer, forcing the Employer to articulate alternatives to access. The Board's refusal to allocate the burden properly under a *Babcock & Wilcox* standard has the inexorable effect of reducing the *Babcock* test to mere words without meaning. We request that the Court not allow the Board to set up a sham test. A union, seeking access to obtain health and safety information, must discharge the burden of exhausting all alternate means prior to being granted entry to the Employer's premises.

Finally, the instant access request concerns the sporadic and minimal exposure of employees, already wearing hearing protection, to noise levels which are in compliance with OSHA standards. Thus the case at bar raises, at best, a relatively insignificant health and safety concern. The Board's and appellate court's decision to allow access in this case is tantamount to sanctioning access in every situation where a union alleges that a safety or health issue exists. If the Board's and the appellate court's opinions stand unchallenged, this will result in a *per se* right of access when health and safety concerns are in issue, contrary to the intent of this Court in creating the balancing test in *Babcock*.

The issue of the appropriate test to be applied in cases concerning access to the employer's private property by a non-employee union representative to acquire health and safety information, as well as the proper application of that test, is important to the administration of the National Labor Relations Act. This case has been adjudicated at three different levels with inconsistent results. Inasmuch as this case presents an opportunity of first impression for this Court to strike the proper balance between the private property rights of employers and the need of unions for health and safety information, an area which has been confused by the establishment of conflicting standards, review by this Court is warranted.

CONCLUSION

For the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CORNELIUS J. MOYNIHAN, JR., P.C.
STEWART A. BRODER*
PEABODY & BROWN
One Boston Place
Boston, MA 02108
(617) 723-8700
Counsel for Petitioner
Holyoke Water Power Company

Of Counsel:
JASON BERGER, P.C.
ROSEMARY W. SPAETH

DATED: APRIL 25, 1986

* Attorney of Record

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 85-1226

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

HOLYOKE WATER POWER COMPANY,
RESPONDENT.

LOCAL 455, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
INTERVENOR.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
COFFIN, *Circuit Judge*,
ALDRICH, *Senior Circuit Judge*, and
WISDOM,* *Senior Circuit Judge*.

Linda Dreeben with whom *Rosemary M. Collyer*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Robert E. Allen*, Associate General Counsel, and *Elliott Moore*, Deputy Associate General Counsel, were on brief for petitioner.

Jason Berger, P.C. with whom *Peabody & Brown*, was on brief for respondent.

James O. Hall for intervenor.

Donald R. Crowell, II, Linda E. Rosenzweig, Pepper, Hamilton & Scheetz, Stephen A. Bokat, Stephen A. Bokat and *National*

* Of the Fifth Circuit, sitting by designation.

Chamber Litigation Center, Inc. on brief for Chambers of Commerce of the United States, Amicus Curiae.

Michael H. Gottesman, Jeremiah A. Collins, David M. Silberman, Laurence Gold and *Laurence Cohen* on brief for American Federation of Labor and Congress of Industrial Organizations, Amicus Curiae.

November 27, 1985

WISDOM, *Senior Circuit Judge*:

The issue in this case is whether an employer must allow a non-employee union representative into its plant to measure noise levels in a particularly noisy room. We conclude that the union's representative is entitled to access to the room.

I.

Holyoke Water Power Company operates the Mt. Tom power plant. One room of the plant contains two large fans that force air into the plant's burners. This "fan room" is extremely noisy. The company has posted a notice that hearing protection must be worn in the fan room, and provides ear protectors for that purpose. No one is stationed in the fan room, although employees must enter it to perform maintenance and repair work.

During 1981 and 1982, the Mt. Tom Plant began burning coal instead of oil. Prior to the conversion, the fans ran at full speed about sixty percent of the time. They now run at full speed about ninety-five percent of the time. The union, which represents the company's production and operations employees, sent an industrial hygienist into the plant to survey possible hazards created by the conversion to coal. The hygienist requested access to the fan room. When the company refused the request, the union filed an unfair labor practice charge. The Board ruled in favor of the Union. 273 N.L.R.B. No. 168 (Jan. 11, 1985). It now petitions for enforcement of the order.

II.

Prior to this case, the Board treated union requests for access to an employer's property to obtain health and safety information as simple requests for information. *See Winona Industries*, 257 N.L.R.B. 695 (1981). The Supreme Court has held that employers must "provide information that is needed by the bargaining representative for the proper performance of its duties". *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 435-36, 87 S.Ct. 565, 17 L.Ed.2d 495 (1967). Safety and health conditions are conditions of employment about which employers bargain upon request, and are therefore within the scope of the bargaining representative's duties. *See Oil, Chemical & Atomic Workers Local Union No. 6-418* v. *NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983). The union, however, is not invariably entitled to enter the employer's plant to obtain information. "A union's bare assertion that it needs information . . . does not automatically oblige the employer to supply all the information in the manner requested." *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 314, 99 S.Ct. 1123, 59 L.Ed.2d 333 (1979). The information must be relevant to the union's duty to represent its members. *See Emeryville Research Center* v. *NLRB*, 441 F.2d 880, 883 (9th Cir. 1971). "When the employer presents a legitimate, good faith objection on grounds of burdensomeness or otherwise, and offers to cooperate with the union in reaching a mutually acceptable accommodation, it is incumbent on the union to attempt to reach some type of compromise with the employer as to the form, extent, or timing of disclosure." *Soule Glass and Glazing Co.* v. *NLRB*, 652 F.2d 1055, 1098 (1st Cir. 1981).

We agree with the Administrative Law Judge's conclusion, approved by the Board, that the company was required to grant the hygienist access under *Winona*. The information sought by the union clearly was relevant to the union's

statutory duty to bargain about conditions of employment.[1] The record shows that even short exposures to high levels of noise can cause loss of hearing, stress, hypertension, nervousness, or irritability. Although union employees are not permanently stationed in the fan room, they enter it regularly and may remain inside for a full day. The company argues that the information is irrelevant because employees did not raise the issue with the company. The union's right to information, however, "is not dependent upon the existence of some particular controversy or the need to dispose of some recognized problem". *Oil, Chemical & Atomic Workers*, 711 F.2d at 361. Moreover, at least two employees complained to the union about the noise level in the fan room. The information is not irrelevant merely because the company has posted a warning outside the fan room and provided hearing protection for employees. One witness testified that the company's ear protectors have a tendency to slip off when worn over hardhats. We agree, moreover, that "the proposition that a union must rely on an employer's good intentions concerning the vital question of health and safety of represented employees seems patently fallacious". 711 F.2d at 361. Finally, the fact that the union might have raised the issue earlier, but did not, does not render the information it requests irrelevant.[2]

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[1] Information bearing on conditions of employment, including plant noise levels, may be presumptively relevant. *Press Democrat Publishing Co.* v. *NLRB*, 629 F.2d 1320, 1324 (9th Cir. 1980). We need not, and do not, decide that question today.

[2] Similarly, the fact that the Occupational Safety and Health Administration has promulgated a noise standard, *see* 29 C.F.R. § 1910.95, does not make the requested information irrelevant. The union is entitled to bargain for a standard that exceeds the one established by OSHA. Although the union could have obtained the results of noise studies on file with OSHA under 29 C.F.R. § 1910.20, OSHA measurements may be subject to the same defects as measurements made by the employer. Moreover, the Board has held that the union's right to obtain information from the employer is not affected by the availability of the information from other sources absent special circumstances. *See Colgate-Palmolive Co.*, 261 N.L.R.B. 90, 92 n.13 (1982).

We agree with the Board's conclusion that the company failed to provide the union with the information it needed. One company study measured the average noise levels to which individual employees were exposed as they moved about the plant during an eight-hour period. The union is interested in noise levels in the fan room alone. A second company study, made after the union's complaint was filed by a company employee who is not an industrial hygienist, did measure noise levels in the fan room. The results of this study may have been affected by the exact location of the measuring apparatus and by the positioning of doors and louvers. The union expert's recommendations, moreover, are based in part on direct observation of employee work patterns. In short, we agree with the Board's finding that the noise measurements requested by the union have an inherently subjective component, so that the union reasonably insisted on obtaining access for its own hygienist.

The company argues that in these circumstances the union was obliged to pursue other means of obtaining the information it sought before filing an unfair labor practice charge. We disagree. The company flatly refused to provide the union's hygienist with access to the fan room. In our view, the union reasonably concluded that no other source of information was adequate. In any event, the company did not offer to provide any information until after the unfair labor practice charge had been filed. The union reasonably concluded that it could not obtain the information without an order from the Board.

III.

The Board reached the same result by a different route. It rejected the *Winona* test, and instead balanced the Union's interest in obtaining access against the Company's interest in preventing an invasion of its property. The Supreme Court first adopted this balancing approach to handle requests for access by non-employee union organizers who are likely to

disrupt the employer's operations. *See NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956). *Babcock & Wilcox* and its progeny do not obviously govern this case. The balancing cases typically arise out of union requests for access posing a significant threat to the employer's rights. In *Hudgens* v. *NLRB*, for example, non-employees asserted a right to picket on the employer's property. 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). Clearly the potential for disruption is not as great where, as here, the union already represents the employees, and seeks access only to study a possible threat to the health and safety of its members.

Babcock & Wilcox, moreover, discusses the employer's duty to refrain from interfering with protected employee activities. 351 U.S. at 109, 112. That duty is imposed by § 8(a)(1) of the National Labor Relations Act. This case, by contrast, is based on the employer's affirmative duty to bargain under §§ 8(a)(5) and 8(d) of that Act. Less weight may be due the employer's property rights when the employer is subject to a duty to bargain.

The choice between *Winona* and a balancing test is not crucial in a situation such as the one presented in this case. The National Labor Relations Act requires the Board to resolve conflicts between § 7 rights and property rights and to seek accommodation of those rights "with as little destruction of one as is consistent with the maintenance of the other". *Babcock & Wilcox*, 351 U.S. at 112. The Supreme Court has said that "[t]he locus of that accommodation. . . may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context". *Hudgens* v. *NLRB*, 424 U.S. at 522. If the union's interest in obtaining information is substantial, and the employer's interest in keeping union representatives off its property is insignificant, both *Winona* and a balancing test point to the same result.

Because we agree with the Board that the outcome in this case is the same under either test, we need not decide whether the general balancing formula of *Babcock & Wilcox* applies to requests for access by unions that already represent the employees. While the outcome necessarily is closer under a balancing test than under *Winona*, the company's interest in denying access in this case appears to be insubstantial. The potential for disruption is not great, since the union already represents the employees. The industrial hygienist's investigation will last a day or less. Since no employees are regularly stationed in the fan room, the hygienist will not disrupt employee work patterns.

The company suggests that a remand would allow it to develop the property interests at stake. Under *Winona*, the company was free to argue that allowing access would cause it undue hardship or inconvenience, or interfere with its business operations. *See Soule Glass and Glazing Co.* v. *NLRB*, 652 F.2d at 1098-99. We think this afforded the company a sufficient opportunity to develop its property interests.

The Board's petition for enforcement of its order is GRANTED.

APPENDIX B

CLERK'S OFFICE

United States Court of Appeals
For the First Circuit

No. 85-1226

N.L.R.B.

v.

HOLYOKE WATER POWER CO.
INTERNAT'L BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 455

December 19, 1985

Mandate herein issued today.

FRANCIS P. SCIGLIANO, *Clerk.*

APPENDIX C

273 NLRB No. 168

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE 1-CA-20618

HOLYOKE WATER POWER COMPANY

and

LOCAL 455, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

DECISION AND ORDER

On 31 August 1983 Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent, the Charging Party,[1] and the General Counsel filed exceptions and supporting briefs, and the Respondent and the Union filed answering briefs.[2]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions for the reasons set forth below and to adopt the recommended Order as modified.

The record shows that the Respondent operates a power plant which includes a Forced Draft Fan Room (fan room). The fan room contains two fans which force air into the

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[1] Hereafter the Union.

[2] The Respondent has requested oral argument. The request is denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Respondent's burners as a part of the combustion process. No one disputes that the fan room is very noisy, and Respondent's Station Superintendent Robert Dwyer acknowledged that there is a noise problem there. The Respondent provides earmuffs for those who must enter this room and has posted notices that the fan room is a "High Noise Area. Hearing Protection Must Be Worn." Although no employees work full time in the fan room, the Respondent's mechanics and operators enter the room periodically to perform maintenance and repair work.[4]

The Respondent and the Union have had a collective-bargaining relationship since 1971. On 11 January 1983 the Union requested that the Respondent permit the Union's industrial hygienist to have access to the fan room to survey potential health and safety hazards. The Respondent denied the Union's request but gave the Union a summary of an overall noise survey performed in August 1982 by a hygienist engaged by the Respondent. This survey did not specifically cover the noise level of the fan room, but rather showed the weighted average of noise level exposures of certain employees. The Respondent later directed its test coordinator, Richard Ward, to take a noise level reading in the fan room and supplied the Union with a copy of Ward's report. Ward, who is not an industrial hygienist, testified that he was unaware of whether conditions in the fan room at the time of his reading were representative of its usual conditions.

The judge found that the Respondent was obligated to grant access to the fan room to an industrial hygienist of the Union's choice and that the Respondent violated Section 8(a)(1) and (5) of the Act by denying the Union's request for such access. In so doing, the judge noted the obligation of an employer to

[4] In sec. III,B of his decision, the judge stated that mechanics are usually there for an 8-hour day when they go into the fan room. However, Respondent's mechanic William O'Rourke testified that the amount of time spent in the fan room varies. He said that routine preventive maintenance entails about 15 minutes while work on the pump is usually an 8-hour job.

provide a union with information relevant and necessary to the union's performance of its representation duties. He noted also that an employer is obligated to bargain on request about health and safety conditions since they are terms and conditions of employment. Then, relying on *Winona Industries*, 257 NLRB 695 (1981), the judge noted that requests for access to survey for safety hazards are in the nature of requests for information and that access cannot be denied. He found that granting access would not cause the Respondent any undue hardship, and he noted the testimony of the Union's hygienist that its testing would take at most 1 day to complete.

In finding a violation, the judge rejected the Respondent's contentions that (a) access is irrelevant and unnecessary to the Union's representation duties, and (b) the Respondent did supply the information sought, albeit in the form of the test results then in the Respondent's possession. The judge noted that the many hazards inherent in exposure to high noise levels certainly make this matter relevant to the union's representation duties. He further found the test results given the Union were inadequate for the Union's purposes. He noted that the first test merely gauged the average noise level to determine if it fell within OSHA standards, and he noted the undisputed testimony of the Union's hygienist that hearing can be damaged even where the average noise level falls within OSHA standards. Finally, he noted that there was some dispute as to the method and results of these tests.

In its exceptions the Respondent argues, inter alia, that the Union's request for access must be balanced against the Employer's property rights and that, here, its property rights must prevail because the Respondent has provided the Union with studies and has allowed the Union's business agent access to the fan room. Accordingly, the Respondent contends, it has provided the Union with an alternate means of obtaining the needed information, thus obviating the need for access to its premises.

We agree with the Respondent's contention that an employer's right to control its property is a factor that must be weighed in analyzing whether an outside union representative should be afforded access to an employer's property. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Thus, we disagree with the judge's analysis insofar as it finds that a request for access is tantamount to a request for information; that is, the union is entitled to access if it is shown that the information sought is relevant to the union's proper performance of its representation duties. While the presence of a union representative on the employer's premises may be relevant to the union's performance of its representative duties, we disagree that that alone, ipso facto, obligates an employer to open its doors. Rather, each of two conflicting rights must be accommodated. *Fafnir Bearing Co.* v. *NLRB*, 362 F.2d 716 (2d Cir. 1966). First, there is the right of employees to be responsibly represented by the labor organization of their choice and, second, there is the right of the employer to control its property and ensure that its operations are not interfered with. As noted by the Supreme Court in *Babcock & Wilcox*, supra, 351 U.S. at 112, the Government protects employee rights as well as property rights, and "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."

Thus, we are constrained to balance the employer's property rights against the employees' right to proper representation. Where it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruptions of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternate means other than

by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.

In sum, the circumstances presented in each case involving a request for access must be carefully weighed, and each of the conflicting rights must be carefully balanced and accommodated in reaching a decision. We shall in the future analyze such cases in this fashion, and we overrule those prior Board cases such as *Winona Industries, supra,* to the extent that they set forth an inconsistent analysis.

Applying this analysis to the instant case, we find that the Respondent's property rights, on balance, are outweighed and that the Respondent must afford the union hygienist reasonable access to its fan room to conduct noise level studies.

First, we agree with the judge that health and safety conditions are a term and condition of employment about which an employer is obligated to bargain on request. Clearly, health and safety data is relevant to the Union's representation obligation. *Minnesota Mining Co.*, 261 NLRB 27 (1982). It is a matter of common knowledge that exposure to excessive noise presents potential health hazards, and in this case no one disputes that the Respondent's fan room is very noisy. The Respondent's safety superintendent acknowledged that there is a noise problem there. In these circumstances, the employees' right to responsible representation entails the Union's obtaining accurate noise level readings for the fan room to ascertain the extent of the hazard and to suggest means of ensuring that employees are properly protected. Balancing this right against the Respondent's asserted property rights, we find that, here, the property rights must yield to the extent necessary to enable the union hygienist to independently conduct his noise level tests.

We note that the Respondent says that access would entail interference with production; however, we also note that the fan room is not a production area and no employees work

there full time. Rather, only mechanics and operators enter periodically to maintain and repair the equipment. In these circumstances, it appears that the presence of a union hygienist in the fan room would occasion little if any interference with the production process. Moreover, for the reasons relied on by the judge, we agree that the test results which the Respondent supplied are insufficient to meet the Union's purposes. Nor is the Respondent's willingness to permit the Union's business agent to enter the fan room sufficient absent evidence that the business agent is qualified to perform the tests and evaluate the results.

Accordingly, we agree with the judge that the Respondent must permit a union hygienist to enter its fan room to test for noise hazards. However, since the judge did not in his recommended Order place any restrictions on the access ordered, we shall modify the recommended order to provide that the access be for a reasonable period sufficient to allow the union hygienist to fully observe and survey noise level hazards. This limitation is in line with our resolve to accommodate the conflicting rights with as little destruction of one as is consistent with the maintenance of the other.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Holyoke Water Power Company, Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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[5] For this reason, and because such access has not even been shown necessary in the first place, we reject the contention of the General Counsel and the Union that the recommended Order should be modified to provide for plantwide access.

1. Substitute the following for paragraph 2(a).

"(a) On request, grant access, by an industrial hygienist designated by the Union, to the FD fan room for a reasonable period sufficient to permit the hygienist to fully observe and survey noise level hazards."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 11 January 1985

DONALD L. DOTSON, *Chairman*
ROBERT P. HUNTER, *Member*
PATRICIA DIAZ DENNIS, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Local 455, International Brotherhood of Electrical Workers, AFL-CIO, by denying the Union's request for access to the Forced Draft Fan Room at our Mt. Tom facility by an industrial hygienist designated by the Union to observe and survey noise level hazards which are relevant to the Union's discharge of its bargaining obligation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, grant access by an industrial hygienist designated by the Union to the Forced Draft Fan Room for a reasonable period sufficient to permit the hygienist to fully observe and survey noise level hazards.

HOLYOKE WATER POWER COMPANY
(Employer)

Dated_____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Walker Building, Third Floor, 120 Boylston Street, Boston, Massachusetts 02116, Telephone 617-223-450.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 1-CA-20618

HOLYOKE WATER POWER COMPANY

AND

LOCAL 455, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Robert P. Redbord, Esq., of Boston, MA, for the General Counsel.
James O. Hall, Esq., of Boston, MA, for the Charging Party.
Jason Berger, Esq. and *Tina L. Hestrom, Esq.*, of Boston, MA, for the Respondent.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge: This case arose upon a charge filed by Local 455, International Brotherhood of Electrical Workers, AFL-CIO, herein the Union, on January 14, 1983. The Complaint, which issued on February 25, 1983, alleges that Holyoke Water Power Company, herein the Respondent, violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein the Act, by refusing to give the Union's industrial hygienist access to the Forced Draft Fan Room (FD Fan Room) at Respondent's Mt. Tom location to observe and survey safety hazards regarding noise levels since the Union's request on January 11, 1983.

Respondent, in its answer, denied the commission of any unfair labor practices. Although Respondent admitted it denied access it claims that access is not necessary for, or relevant to, the Union's function as the exclusive bargaining representative of unit employees.

A hearing was held on April 11 and 12, 1983 in Boston, Massachusetts. All parties filed briefs. Based upon the entire record in the case, including my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions of law.[1]

Findings of Fact

I. Jurisdiction

Respondent, Holyoke Water Power Company, is, and has been at all times material herein, a corporation organized under and existing by virtue of the laws of the Commonwealth of Massachusetts. At all times mentioned herein, Respondent has maintained its principal office and place of business at One Canal Street in the City of Holyoke, Massachusetts and is now and continuously has been engaged at said plant and others generating and supplying electric power to residential and commercial customers.

In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $250,000 and purchases and receives at its Holyoke, Massachusetts location products, goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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[1] General Counsel's motion to correct transcript is hereby granted.

II. The Labor Organization Involved

It is admitted and I find that the Union, Local 455, International Brotherhood of Electrical Workers, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practice

A. *Issue Presented*

The only issue is whether Respondent violated Section 8(a)(1) and (5) of the Act by refusing to give an industrial hygienist designated by the Union access to the FD Fan Room, at Respondent's Mt. Tom facility to observe and survey safety hazards regarding noise levels.

B. *Background and Facts*

Since 1971, the Union has been the exclusive collective bargaining representative of all employees of Respondent employed in its Production and Operations Department at its Mt. Tom station, Riverdale station, Hadley Falls station and Holyoke Hydro station, in Holyoke, Massachusetts. The Union has been recognized as such representative by the Respondent and they have executed successive collective bargaining agreements.

Before 1981, Respondent generated power using oil. In 1981, however, the Mt. Tom facility began converting to coal as its power source. This change was subject to a contract reopener under the parties' 1980-1982 collective bargaining agreement.

In the fall of 1981, Respondent and the Union began negotiations on the effect of this conversion upon the bargaining unit employees. Health and safety matters were among the issues discussed in the reopener. During the negotiations on the coal reopener, Respondent retained an acoustical engineering firm, Goodfriend Associates, to make a presentation to the Union concerning noise exposure in the plant. The Union

retained an industrial hygienist, Richard Youngstrom, to help it interpret the report presented by Respondent and to help the Union identify safety hazards and make recommendations for controlling such hazards.

The coal reopener negotiations concluded in November 1981, with various points of agreements between the parties. The contract containing the coal reopener was due to expire on July 1, 1982, and the parties negotiated toward a new contract from May, 1982 until June, 1982. The Union raised several health and safety matters in those negotiations. A new collective bargaining agreement was reached, and is currently in effect.

After the coal conversion was finalized, the Union requested that its industrial hygienist be given access to Respondent's premises to survey safety hazards. This request was denied and led to an unfair labor practice charge, which was settled under the terms of a settlement agreement permitting access by the Union's industrial hygienist to survey hazards associated with the conversion to coal. The FD Fan Room was not mentioned in the settlement agreement.

Edward Collins, the Union's business manager and financial secretary, and Youngstrom met with representatives of the Respondent on January 11, 1983 to discuss compliance with the settlement agreement. At this meeting, access was granted to those parts of the plant covered in the settlement agreement but access was denied to the FD Fan Room. Access was denied by Respondent's Plant Superintendent, Robert Dwyer, and Regional Personnel Manager, Donald Riga. The only reason given for this denial was that the FD Fan Room was not covered in the settlement agreement.

Youngstrom conducted a survey of potential health and safety hazards on January 11, 1983. The results of this survey and his recommendations were included in a report submitted to the Union and used by the Union in collective bargaining with respect to health and safety matters.

The Respondent provided the Union with a summary of a noise survey done by industrial hygienist designed by Respondent, i.e., Oneil Banks. The survey was taken in August 1982, but did not include the FD Fan Room.

The FD Fan Room is a room containing two forced draft fans which force air into the station's burners. The fans, driven by motors, are part of the combustion process of Respondent. The FD Fan Room is approximately 20 feet by 40 feet and 30 feet high. In addition to the two fans the room contains two limitex sump pumps, various piping, four ash hoppers that collect ash and louvers which are built into the walls and vary the amount of air pulled into the room.

The construction and operation of the FD Fan Room has been the same since it was built in 1960, however, the conversion to coal has increased the percentage of time the fans are required to operate at full speed from 60 percent to about 95 percent of the time.

While no employees are assigned to work in the FD Fan Room full-time, employees must enter the room in the course of their jobs for various purposes and at various times. Mechanics must enter the FD Fan Room to repair pumps, repair leaks, do preventive maintenance and other duties to ensure proper functioning of the fans and meters. Mechanics are usually in the room for an 8-hour day when they go into the FD Fan Room. On several occasions mechanics have spent two or three straight days working in the room, depending upon the job. Preventive maintenance done by mechanics requires about 15 or 20 minutes in the FD Fan Room once every month. Utility operators go into the FD Fan Room every 2 hours during an 8-hour shift and remain in the room between 5 and 10 minutes each time as part of their "rounds". Those "rounds" includes checking bearings, checking oil levels, opening and closing valves and checking that nothing is out of order with either sump pump. Occasionally utility operators have to spend up to an hour in the room.

There is no dispute about the fact that the FD Fan Room is extremely noisy. Witnesses testifying for both the General Counsel and Respondent testified that the room was so noisy that a conversation was impossible and you had to read lips to communicate. Respondent has signs posted outside the FD Fan Room which warn "High Noise Area Hearing Protection Must Be Worn." Employees testified as to the effects upon them of exposure to noise in the FD Fan Room, these effects included ringing in the ears, temporary decrease in hearing ability and excessive fatigue. A year or so prior to the hearing in this case an employee named James Parnicky, a utility operator, had complained to the Union about the noise in the FD Fan Room. In addition, during the reopener talks in November 1982, Norman Racine, a mechanic, had likewise complained about the noise in the FD Fan Room.

Respondent provides earmuffs or earphones for employees and others who must go into the FD Fan Room. Employees credibly testified that they were less than satisfied with this protection, explaining that the earmuffs or earphones often fell off in the course of their work and were difficult to adjust over other required equipment such as hard hats.

After denying the Union's request for access to the FD Fan Room, Respondent discovered that it had never measured the noise level in the room. On February 8, 1983, Respondent directed test technician supervisor Richard Ward to conduct readings on the noise level in the FD Fan Room. Mr. Ward testified that since he was not an industrial hygienist, he could not make any recommendations about what to do with his readings. He also testified that he had no experience designing controls and had no way of knowing if he took his readings under representative conditions. Respondent sent a copy of Mr. Ward's report to the Union on March 18, 1983.

C. *Analysis*

It is well established that an employer has a duty to provide a union with information which is reasonably necessary and relevant to the Union's duty to represent its members. Equally settled is that safety and health conditions are terms and conditions of employment about which an employer is obligated to bargain upon request. *Gulf Power Company*, 156 NLRB 622 (1966), *enf'd.*, 384 F.2d 822 (5th Cir. 1967); *Minnesota Mining & Manufacturing Co.*, 261 NLRB 27 (1982). Respondent contends that the access requested here by the Union is not reasonably necessary and relevant to the Union's duty to represent employees because the Union has not "demonstrated a safety concern among employees." The essence of this contention is that no employee on the union-management safety committee raised the issue at those meetings and no grievance has been filed, therefore, the information is not relevant. Respondent argues further that it has demonstrated an awareness of the high noise levels and has taken steps to remedy the situation.

Employee requests for Union action is not determinative of a Union's obligation to bargain regarding the matter. It is noted, however, that the reopener talks raised the issue of noise levels in parts of the plant and reasonably and legitimately raised the issue of noise generally as an issue the Union should concern itself with. As noted earlier utility operator James Parnicky and mechanic Norman Racine had complained about noise in the FD Fan Room and Racine had brought this to the attention of Respondent two months before access to the FD Fan Room was requested.

Respondent also contends that because no employees work full-time in the FD Fan Room, the information about noise there is irrelevant. Testimony from industrial hygienists retained by the Respondent and the Union explained the hazard of exposure to noise at certain levels. The hazards include damage to, and loss of hearing, nervousness, hypertension and

psychological problems. The probability of such problems certainly are relevant to the Union's duty to represent its members.

The Board held recently that an employer's refusal to give access to a union industrial hygienist for inspection and survey of safety hazards, violates Section 8(a)(1) and (5) of the Act. *Winona Industries, Inc.*, 257 NLRB 695 (1981). Such access is treated as in the nature of information and access cannot be denied. The facts here put this case squarely within the principles of *Winona, supra*. In *Winona*, as here, Respondent argued that it was not obligated to give access to the Union's industrial hygienist because even if relevant, the information sought had been given or was available through other means. The results of a noise dosimeter study taken at Respondent's Mt. Tom facility in August 1982, by Respondent's industrial hygienist, Oneil Banks, were given to the Union. The results of a later sound level test performed in the FD Fan Room by Richard Ward, a test coordinator for Northeast Utilities Service Company, Respondent's parent company, were also provided. These results do not change the Union's need for access by its industrial hygienist. The study from Banks did not focus specifically on several items which the Union needed to test. There was also some dispute as to the method and results of those tests. Respondent's study was not sufficient to give the Union information which it needed to recommend and design controls, but rather checked an average noise level to see if it was within OSHA compliance. It is informative to note that in preparing for trial in this case Respondent's lead counsel, Jason Berger, physically inspected the FD Fan Room and had one of his witnesses testify as to what happened when the witness and Berger tried to have a conversation inside the FD Fan Room.

There was unrebutted testimony by the Union's industrial hygienist that hearing damage can take place even when weighted average noise levels are within OSHA compliance. This information was not supplied. Banks admitted that his study could not tell for what period of time an employee had

been exposed to peak noise levels, for how long or how many times. He also admitted that factors such as the presence or absence of windows and doors and whether or not they were opened, would affect noise level exposure perhaps significantly, but such things were not in his reports. All of these omissions make the offered studies inadequate for the Union's purposes and no adequate substitute for permitting access to the FD Fan Room by the Union industrial hygienist.

Furthermore, granting access to the Union's industrial hygienist would not cause any undue hardship or inconvenience to Respondent or interfere with its business operations. Nothing in the FD Fan Room was confidential in nature. The Union designated industrial hygienist Richard Youngstrom testified the test would take probably less than half a day or at most one day. After the Union's January 11, 1983 request for access was denied, Respondent had tests runs and turned the results over to the Union. It could have just as easily granted the Union that same access to run its own test and should have.

I find that Respondent had an obligation to grant access to the FD Fan Room to the Union's industrial hygienist. By denying such request, Respondent refused to bargain in good faith and violated Section 8(a)(1) and (5) of the Act.[2]

Conclusions of Law

1. Respondent, Holyoke Water Power Company, is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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[2] An analysis of the rationale underlying the "time study cases" cited by the General Counsel also support the General Counsel's position that the denial of access violated the Act. The "time study cases" concluded that to deny the Union's time study expert access to conduct his own tests even though Respondent turned over the results of its time study tests violated the Act. *Fafnir Bearing Co.* v. *N.L.R.B.*, 146 NLRB 1582 (1964), *enf'd.*, 362 F.2d 716 (2d Cir. 1966), *The Kendall Co.*, 196 NLRB 588 (1972), *Wilson Athletic Goods*, 169 NLRB 621 (1968).

2. Local 455, International Brotherhood of Electrical Workers, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. By denying the Union's request for access, by an industrial hygienist chosen by the Union, to the FD Fan Room at Respondent's Mt. Tom facility to observe and survey noise level hazards, which were relevant to the Union's discharge of its bargaining obligation, Respondent refused to bargain in good faith and violated Section 8(a)(1) and (5) of the Act.

Remedy

Having found that Respondent violated Section 8(a)(1) and (5) of the Act, I recommend that it be ordered to cease and desist therefrom and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act. I also recommend that Respondent be ordered to take certain affirmative action necessary to effectuate the policies of the Act. I will not recommend a broader remedial order than the posting of a notice and the granting of access to the FD Fan Room. However, future requests for access to parts of the plant by the Union should be treated by Respondent consistent with the principles underlying *Winona, supra.*

On the basis of the foregoing findings of fact and conclusions of law and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Respondent, Holyoke Water Power Company, Holyoke, Massachusetts, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain in good faith with Local 455, International Brotherhood of Electrical Workers, AFL-CIO, by denying the Union's request for access to the FD Fan Room at Respondent's Mt. Tom facility by an industrial hygienist chosen by the Union to observe and survey noise level hazards which are relevant to the Union's discharge of its bargaining obligations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, grant access to the FD Fan Room by an industrial hygienist designated by the Union to observe and survey noise level hazards.

(b) Post at its Mt. Tom facility in Holyoke, Massachusetts, copies of the attached notice marked "Appendix".[4] Copies of said notice on forms provided by the Regional Director

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[3] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[4] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable step shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. August 31, 1983

s/ MARTIN J. LINSKY

MARTIN J. LINSKY
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT refuse to bargain in good faith with LOCAL 455, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, by denying the Union's request for access to the Forced Draft Fan Room at our Mt. Tom facility by an industrial hygienist designated by the Union to observe and survey noise level hazards which are relevant to the Union's discharge of its bargaining obligation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL, upon request, grant access to the FD Fan Room by an industrial hygienist designated by the Union to observe and survey noise level hazards.

HOLYOKE WATER POWER COMPANY

(Employer)

Dated _____ By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE
AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Walker Building—Room 40, 120 Boylston Street, Boston, Massachusetts 02110 (Telephone No. (617) 223-4550).

APPENDIX E

IN THE MATTER OF: HOLYOKE WATER POWER CO.
CASE NO. 1-CA-19,312

SETTLEMENT AGREEMENT

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE — Upon approval of this Agreement, the Charged Party will post immediately in conspicuous places in and about its plant/office, including all places where notices to employees/members are customarily posted, and maintain for 60 consecutive days from the date of posting, copies of the attached Notice made a part hereof, said Notices to be signed by a responsible official of the Charged Party and the date of actual posting to be shown thereon. In the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

A qualified industrial hygienist is an individual that is a Certified Industrial Hygienist or a Certified Industrial Hygienist In Training (American Board of Industrial Hygiene).

By the execution of this Agreement, the Charged Party does not admit that it has violated the National Labor Relations Act, as amended, and the parties understand that this Agreement does not prejudice the parties in regard to any future information or access requests.

REFUSAL TO ISSUE COMPLAINT—In the event the Charging Party fails or refuses to become a party to this Agreement, and if in the Regional Director's discretion it will effectuate the policies of the National Labor Relations Act, the Regional Director shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 10 days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case, as well as any Answer(s) filed in response.

PERFORMANCE—Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or, if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE—The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in this case.

HOLYOKE WATER POWER CO.	LOCAL 455, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(Charged Party)	*(Charging Party)*
By: /s/ JASON BERGER, *Attorney*	By: /s/ EDWARD W. COLLINS, JR., *Bus. Mgr.*
(Name and Title)	*(Name and Title)*
Date: 8/27/82	Date: September 3, 1982
RECOMMENDED BY: /s/ ROBERT P. REDBORD	Approved By: /s/ ROBERT S. FUCHS
(Board Agent)	*Regional Director* NATIONAL LABOR RELATIONS BOARD
Date: 9/29/82	Date: 9-30-82

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Supreme Court, U.S.
FILED
JUN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1761

In the Supreme Court of the United States

OCTOBER TERM, 1985

HOLYOKE WATER POWER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board
Washington, D.C.20570

QUESTION PRESENTED

Whether the Board correctly found that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by refusing to grant a union-designated industrial hygienist access to part of its plant in order to observe and survey noise level hazards.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1761

HOLYOKE WATER POWER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 778 F.2d 49. The decision and order of the National Labor Relations Board (Pet. App. C1-C8), including the decision of the administrative law judge (Pet. App. D1-D13), are reported at 273 N.L.R.B. No. 168.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1985. On February 5, 1986, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including April 26, 1986. The petition was filed on April 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges an order of the National Labor Relations Board (NLRB or Board), enforced by the court of appeals, that it afford a union-designated industrial hygienist access to part of its workplace.

1. Petitioner operates a power plant in Holyoke, Massachusetts. One room in the plant contains two large fans which force air into the plant's burners. This "fan room" is extremely noisy. Petitioner has posted notices stating that "Hearing Protection Must Be Worn" in the fan room, and it provides earmuffs—which, however, are not always effective—for employees required to enter the room. No employees work full time in the fan room, but petitioner's mechanics and operators periodically enter the room to perform maintenance and repair work. Employees who work in the fan room have suffered from effects of the noise, including ringing in the ears, temporary decrease of hearing, and excessive fatigue. Pet. App. C1-C2, D1, D5-D6.

In 1981 and 1982, petitioner converted the plant's power source from oil to coal. Prior to the conversion, the fans in the fan room ran at full speed 60 percent of the time. After the conversion, they ran at full speed 95 percent of the time. Pet. App. D3, D5.

The Union, Local 455, International Brotherhood of Electrical Workers, has been the collective bargaining representative of production and operations employees at the plant since 1971.[1] In 1981, pursuant to a reopener provision in the parties' collective bargaining agreement, petitioner and the Union began negotiations on the effects, including the health and safety effects, of the coal conversion upon bargaining unit employees. Following a dispute

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[1]The Union intervened in the court of appeals and hence is a respondent before this Court.

in which the Union filed unfair labor practice charges with the Board, the parties entered into a settlement agreement permitting the Union's industrial hygienist to survey hazards associated with the conversion to coal. Pet. App. D3-D4.

Pursuant to the Union's request in January 1983, petitioner granted the Union hygienist access to certain parts of the plant. The Union specifically asked that the hygienist be granted access to the fan room to evaluate its noise levels. Petitioner, however, refused access to the fan room on the ground that it was not specified in the settlement agreement.[2] Instead, petitioner gave the Union a summary of a plantwide noise survey that it had done the previous summer; the survey did not contain information relating specifically to the fan room, but rather showed average noise level exposures for certain employees. Petitioner later had one of its officials, not an industrial hygienist, take a noise level reading in the fan room, and supplied it to the Union. Pet. App. C2, D4-D6.

2. The Board, adopting the conclusion of the administrative law judge (ALJ), found that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), by refusing to grant the Union's hygienist access to the fan room in order to observe and record noise level hazards (Pet. App. C1-C8). In so finding, the Board relied on this Court's decision in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and reasoned that a union request for access to an employer's plant to obtain relevant information required the Board to "balance

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[2]While we do not concede that access to the fan room was not contemplated by the terms of the settlement, it is sufficient to note here that its inclusion vel non there is irrelevant, since the settlement of a particular unfair labor practice charge does not extinguish an employer's general statutory obligation to bargain about health and safety conditions (see Pet. App. A3-A4).

the employer's property rights against the employees' right to proper representation" (Pet. App. C4). The Board stated that where "responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end" (*ibid.*). It stated further that where, on the other hand, "it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access" (*id.* at C4-C5).[3]

Applying this principle here, the Board concluded that petitioner's "property rights * * * are outweighed and that [it] must afford the union hygienist reasonable access to its fan room to conduct noise level studies" (Pet. App. C5). The Board found that because "exposure to excessive noise presents potential health hazards" and "no one disputes that the * * * fan room is very noisy," "the employees' right to responsible representation" requires that the Union have access to the room "to ascertain the extent of the hazard and to suggest means of ensuring that employees are properly protected" (*ibid.*). The Board found that the test results that

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[3]In setting forth the balancing test to be applied to union requests for access to an employer's plant to obtain relevant information, the Board overruled its decision in *Winona Industries*, 257 N.L.R.B. 695 (1981), relied on by the ALJ, to the extent it set forth an inconsistent analysis (Pet. App. C3, C5). In *Winona Industries*, the Board held that a union's request for an in-plant inspection of health and safety conditions by its designated industrial hygienist was in the nature of a request for "information relevant to the [union's] proper performance of its duty to represent * * * employees with respect to terms and conditions of their employment," and that an employer's obligation to grant such a request "is basic and unqualified" (257 N.L.R.B. at 697-698 (footnote omitted)). The Board in that case did not expressly discuss balancing the union's interests against the employer's property interests or the need to consider alternative means for the union to obtain the requested information.

petitioner supplied the Union were an insufficient alternative because the data were irrelevant or incomplete and there was a dispute as to the method and results of the tests (*id.* at C6, D8-D9). Finally, the Board noted that, because the fan room is not a production area and no employees work there full time, granting access to the Union's hygienist would involve "little if any interference with the production process" (*id.* at C5-C6).

3. The court of appeals enforced the Board's order (Pet. App. A1-A7). At the outset, the court agreed with the ALJ's conclusion that, under *Winona Industries*, 257 N.L.R.B. 695 (1981), petitioner was required to grant the hygienist access to the fan room (Pet. App. A3). Noting that the Board had rejected the *Winona* test and instead had applied a balancing test drawn from *Babcock & Wilcox, supra*, the court stated that "*Babcock & Wilcox* and its progeny do not obviously govern this case" (*id.* at A6),[4] but concluded (*id.* at A7 (footnote omitted)):

> Because we agree with the Board that the outcome in this case is the same under either test, we need not decide whether the general balancing formula of *Babcock & Wilcox* applies to requests for access by unions that already represent the employees. While the outcome necessarily is closer under a balancing test than

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[4]The court noted that the *Babcock & Wilcox* balancing approach was adopted "to handle requests for access by non-employee union organizers who are likely to disrupt the employer's operations," and noted that "the potential for disruption is not as great where, as here, the union already represents the employees, and seeks access only to study a possible threat to the health and safety of its members" (Pet. App. A5-A6). The court noted further that *Babcock & Wilcox* "discusses the employer's duty to refrain from interfering with protected employee activities" under Section 8(a)(1) of the National Labor Relations Act, and the court stated that "[l]ess weight may be due the employer's property rights when the employer is subject to a duty to bargain" under Section 8(a)(5) (Pet. App. A6).

under *Winona*, the company's interest in denying access in the case appears to be insubstantial. The potential for disruption is not great, since the union already represents the employees. The industrial hygienist's investigation will last a day or less. Since no employees are regularly stationed in the fan room, the hygienist will not disrupt employee work patterns.

ARGUMENT

1. Petitioner contends (Pet. 10-17) that the court of appeals erred in not expressly approving the application of the *Babcock & Wilcox* balancing test in the circumstances here, and instead "favoring" (Pet. 9) the *Winona* test applied by the ALJ. But the court of appeals explicitly held that it "need not decide" which test is appropriately applied to determine when an incumbent union should be granted access to an employer's plant to observe health and safety conditions, because it concluded that under either test the outcome here would be the same (Pet. App. A7; see also Pet. 7). The restraint exercised by the court of appeals in declining to reach an issue it did not have to is not error and, similarly, there is also no occasion here for this Court to resolve which of the two standards is appropriate.

2. Petitioner's remaining contention (Pet. 17-20) is that the Board, upheld by the court of appeals, erred in concluding under the balancing test that the Union's hygienist is entitled to access to the fan room. That fact-bound issue also does not warrant this Court's review. See, *e.g.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[5]

In any event, there is no merit to petitioner's contention. As the ALJ, the Board, and the court of appeals all found (Pet. App. A3-A5, A7, C5-C6, D8-D9), noise levels in the

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[5]We note the inconsistency between the petitioner's argument for great deference to the Board with regard to the first question presented, and for no deference at all on the second.

fan room constitute an acknowledged health and safety hazard, and the Union has a substantial interest in understanding precisely the nature of the hazard in order to perform its representative function. The potential intrusion upon petitioner's property and management rights is slight because, as the record shows (*id.* at A7, C5-C6, D9), the fan room is not a production area and an investigation by the hygienist will take little time or trouble. There is, moreover, no reasonable alternative to an on-site inspection in this case. The tests conducted by petitioner are insufficient either because they do not contain the relevant data or are incomplete and disputed by the Union (*id.* at A5, C6, D8); allowing a non-hygienist from the Union—petitioner's other offer—is obviously no solution either, since he would lack the needed expertise. The determination by all three reviewing authorities below that the only workable alternative in this case was allowing testing by the Union's own hygienist was correct. Cf. *Fafnir Bearing Co.* v. *NLRB*, 362 F.2d 716, 720 (2d Cir. 1966).[6]

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[6]Thus, there is no merit to petitioner's contention (Pet. 19) that the Union should have been obliged to show that it "unsuccessfully attempted to utilize other means" of obtaining the information before petitioner could be compelled to grant access to the fan room: that obligation was met. As the court of appeals noted (Pet. App. A5), the Union "reasonably concluded" that its own hygienist would need access to the fan room. And, as the court further noted (*ibid.*), petitioner did not offer to provide any information to the Union as an alternative to granting access until after the unfair labor practice charge had been filed. Under those circumstances, the Union could "reasonably conclude[ ] that it could not obtain the information without an order from the Board" (*ibid.*). The decision in *NLRB* v. *Tamiment, Inc.*, 451 F.2d 794, 797-798 (3d Cir. 1971), cert. denied, 409 U.S. 1012 (1972), cited by petitioner (Pet. 19), is therefore inapplicable. In that case, involving union organizers conducting an organizing campaign among employees, the union had failed to show that there were no reasonable alternatives to intruding on the employer's property in order to meet and talk to employees. Here, by contrast, it was shown that the relevant

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board

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information could accurately be obtained only by an inspection of the fan room.

Finally, petitioner's claim (Pet. 19) that the Board's decision has established "a *per se* right of access" whenever health or safety concerns are at issue is erroneous. As the Board made clear (Pet. App. C5), "the circumstances presented in each case involving a request for access must be carefully weighed, and each of the conflicting rights must be carefully balanced and accommodated in reaching a decision."